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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 75-1721

UNITED STATES OF AMERICA,
Petitioner,

vs.

JOSEPH A. CHADWICK, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE, IN SUPPORT OF THE PETITIONER, OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC.; THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION INC; AND THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC.

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Americans for Effective Law Enforcement, Inc.; the National District Attorneys Association, Inc.; and the International Association of Chiefs of Police, Inc. respectfully move this court to file a brief, *amici curiae*, in support of the petitioner in the instant case. This motion is made pursuant to Rule 42 of the Supreme Court Rules. The Solicitor General has consented in writing to the filing of Americans for Effective Law Enforcement and the National District Attorneys Association. The office of the Solicitor General has consented verbally to the filing of the International Association of Chiefs of Police and when we re-

ceive written consent to this filing we will immediately file it with the Clerk of the Court, as we have done with the original consent from the Solicitor General. The respondent has not responded to our letters requesting his consent. Accordingly, we are moving the Court directly for leave to file. The interest of the *amici curiae* and our reasons for desiring to file are set forth below.

INTEREST OF THE AMICI CURIAE.

Americans for Effective Law Enforcement, Inc. (AELE) is a national, not-for-profit, non-partisan, non-political organization incorporated under the laws of the State of Illinois. As stated in its by-laws, the purposes of AELE are:

1. To explore and consider the needs and requirements for effective enforcement of the criminal law;
2. To inform the public of those needs and requirements, to the end that the courts will administer justice based upon a due concern for the general welfare and security of law abiding citizens;
3. To assist the police, the prosecution, and the courts in promoting a more effective and fairer administration of the criminal laws.

In furtherance of these objectives, AELE seeks to represent in our courts, nationwide, the concern of the average citizen with the problems of crime and of police effectiveness in dealing with crime.

The National District Attorneys Association, Inc. (NDAA) is a not-for-profit, non-political, tax exempt corporation composed of approximately 6,000 members representing all 50 states. The purposes of the NDAA are, *inter alia,* to improve and facilitate the administration of justice in the United States and to promote the study of law and legal institutions.

To effectuate these aims, the NDAA for many years has utilized an *Amicus Curiae* Committee to file briefs in cases of

national importance in the United States Supreme Court. The NDAA seeks to make known the views of all prosecutors in the United States and to bring before this Court their positions on matters affecting the discharge of the duties of the prosecutor.

The International Association of Chiefs of Police, Inc. (IACP) is a not-for-profit professional association, and represents over 7,000 chiefs and top executives of American police departments and other law enforcement agencies in all 50 states and in 57 foreign countries. The IACP services the law enforcement profession and the public interest by advancing the art of service. Its aims are to foster police cooperation and the exchange of information and experience among police administrators throughout the world, and to encourage adherence of all police officers to high professional standards of performance and conduct.

The IACP Legal Officers' Section is the only nationally organized body of police legal advisors. They serve as house counsel to 188 law enforcement agencies representing nearly 200,000 police officers and sheriff's deputies in the United States. Most of them are active and participating members of the Section.

The interest of the *amici* in the instant case stems from the importance of the issues involved, the resolution of which will have a direct and material impact upon the effectiveness of law enforcement. The question directly at issue—whether police officers must procure a search warrant prior to the search of a footlocker found in the car of suspects arrested on probable cause—raises important legal and practical problems for police officers nationwide. *Amici* believe, however, that there are two overbearing policy issues involved here: 1. the question of whether a standard of reasonableness should be set for determining the legality of searches and seizures in cases such as the instant case; and 2. the question of whether the good faith shown by the arresting officer should have a bearing in deter-

mining whether a search and seizure was reasonable. These are the questions to which *amici* will address ourselves and wherein our interest lies.

Respectfully submitted,

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ARGUMENT.

I. This Court Should Establish a Standard of Reasonableness, Under the Fourth Amendment, for Determining the Legality of Searches and Seizures in Cases Such as the Instant Case.

Amici consider this case to be of more than usual importance because it presents this Court squarely with the opportunity to resolve, if it wishes, a fundamental Fourth Amendment issue. This issue was characterized by the Solicitor General of the United States in his Petition for Certiorari in the instant case:

Dombrowski, 413 U. S. 433 (1973), *Cardwell* v. *Lewis,* 417 U. S. 583 (1974); arrested persons, *United States* v. *Robinson,* 414 U. S. 800 (1974). In each of these cases a warrantless search was upheld as reasonable (often over vigorous dissent); however, the critical factor in the decision was *what* was being searched rather than addressing the more fundamental issue of reasonableness as opposed to the *per se* warrant requirement.[2]

This Court has recognized this inherent difficulty and confusion. In *Cady* v. *Dombrowski, supra,* Mr. Justice Rehnquist, speaking for the majority, stated with respect to search and seizure cases, particularly those involving vehicles:

> While these general principles are easily stated, the decisions of this Court dealing with the constitutionality of warrantless searches, especially when those searches are of vehicles, suggest that this branch of the law is something less than a seamless web. (413 U. S. at 440.)

The confusion is not limited to automobile searches. The instant case involves the question of searches and seizures, based upon probable cause but[3] without a warrant, of movable personal property. The Solicitor General in his petition for Certiorari has cited to the Court no less than 22 lower court

2. Mr. Justice Stewart, writing for the plurality in *Coolidge* v. *New Hampshire,* 403 U. S. 443 (1971), described the differing judicial philosophy involved in the Fourth Amendment interpretation:

- Some have argued that a determination by a magistrate of probable cause as a precondition of any search or seizure is so essential that the Fourth Amendment is violated whenever the police might reasonably have obtained a warrant but failed to do so. Others have argued with equal force that
- a test of reasonableness, applied after the fact of search and seizure when the police attempt to introduce the fruits in evidence, affords ample safeguards for the rights in question so that "(t)he relevant test is not whether it is reasonable to procure a search warrant but whether the search was reasonable."

3. Judge Thomsen, dissenting from the majority opinion of the Court of Appeals below, described the problem of conflicting court opinions as ". . . the thicket through which state and federal judges, as well as state and federal law enforcement officers, must struggle in cases like this." (532 F. 2d 773 at 786.)

cases, both federal and state, which have reached differing conclusions on the issue presented by the instant case. (Pet. pp. 11-12, ft. 4-8.)

In fact, the Court of Appeals below in suppressing the fruits of the search of the footlocker spoke of: " 'gossamer thin' distinctions which arresting officers could find impracticable, if not impossible to follow." (532 F. 2d 773 at 780.)[4] This statement, we submit, precisely describes the plight of law enforcement officers who are confronted with search and seizure situations. If learned judges of federal and state appellate courts cannot agree about what is and what is not an "unreasonable" search and seizure, the plight of the policeman, untrained in the law and acting under the pressures of law enforcement "on the street," is compounded.

The single most trenchant comment about this situation was made by Mr. Justice Clark dissenting in *U. S.* v. *Chapman,* 365 U. S. 610 (1961):

> Every moment of every day, somewhere in the United States, a law enforcement officer is faced with the problems of search and seizure. He is anxious to obey the rules that circumscribe his conduct in this field. It is the duty of this Court to lay down those rules with such clarity and understanding that he may be able to follow them. (at 622.)

We respectfully submit that the instant case is an appropriate vehicle for this Court to lay down a general rule of search and seizure based not so much on the particular factual situation of a given case (i.e. movable personal property, vehicles, etc.) but based on an interpretation of when a warrantless search is reasonable under the "reasonableness clause" and when a search is *per se* unreasonable under the "warrant clause." Such a ruling would go a long way towards providing the "clarity and understanding" called for by Mr. Justice Clark. (*Chapman, supra.*)

4. The same approach has been suggested by the Solicitor General in his Petition for Certiorari at page 10, ff.

The historical basis of the Fourth Amendment is not of controlling import when we are confronted with questions of searches of automobiles, their contents, or the belongings of railroad train passengers, because, obviously, automobiles and railroad trains were not in existence in 1789 when the Fourth Amendment was framed. Historically, the Amendment was aimed at prohibiting the evils of a general warrant ". . . which either does not give the name of the person to be apprehended, or does not specify any particular place to be searched."[5]

Of interest in the dichotomy between the "warrant clause" and the "reasonableness clause" is the following commentary from the Annals of Congress, Vol. 1, pp. 686-792, House of Representatives Debates, July—August, 1789, regarding amendments to the Constitution, particularly searches and seizures:

> The committee went on to the consideration of the seventh clause of the fourth proposition, being as follows: 'The right of the people to be secured in their persons, houses, papers and effects shall not be violated by warrants issuing without probable cause, supported by oath or affirmation, and not particularly describing the place to be searched, and the persons or things to be seized.'
>
> Mr. Gerry said he presumed there was a mistake in the wording of this clause; it ought to be 'the right of the people to be secure in their persons, houses, papers and effects, against *unreasonable* searches and seizures' and therefore moved that amendment.
>
> This was adopted by the committee.[6] (emphasis supplied.)

The "warrant clause" was then added, which gives some evidence that even the framers of the Constitution were more

5. David Hutchinson, "The Foundation of the Constitution," University Books, Inc., Seacouch, New Jersey (1975), p. 293. See also: *Entick* v. *Carrington,* 19 How. St. Tr. 1029 (1765) in which such warrants were held invalid by the House of Lords in England.

6. Bernard Schwartz, "The Bill of Rights: A Documentary History," Chelsea House Publishers, McGraw Hill Book Company, New York (1971), Vol. II, p. 1112.

concerned with *unreasonable* searches and seizures than with a *per se* warrant requirement.

The Court of Appeals below was asked by the United States to decide the case based on the "reasonableness" of the search of the footlocker. This it expressly refused to do.[7] It chose, rather, to base its opinion on *Chimel* v. *California,* 395 U. S. 752 (1969) which mandated a *per se* warrant rule for searches of dwellings. The lower court held that the language in *Chimel* which limited searches of areas of *dwellings,* incident to arrest, to those areas within the immediate control of the arrestee, applied to the facts of the instant case.

The *per se* rule for dwellings enunciated in *Chimel* is currently the settled law on the matter.[8] However, the fact remains that the instant case does not involve a dwelling. The lower court acknowledged that baggage in transit presented some of the characteristics of automobiles, for which warrantless searches have been upheld; nevertheless, it felt constrained to apply the *per se* rule of *Chimel* v. *California.* It stated specifically that if a relaxation of the warrant rule for baggage should take place it would be up to this Court to so hold.[9]

We urge this Court to clarify the question of warrantless searches of movable personal property, at least; but as indicated above, we further urge the Court to speak definitively on the obvious tension between the *per se* rule of the "warrant clause" of the Fourth Amendment and the more flexible standards of the "reasonableness clause."

We would respectfully suggest a possible basis for a ruling which would clarify the distinction between the two classes of searches. Setting aside the question of searches of dwellings and offices, which the "warrant clause" would seem to control

7. 532 F. 2d 773, at 779.

8. Even *Chimel* recognized exceptions to the *per se* warrant rule, e.g. exigent circumstances, *McDonald* v. *United States,* 451 U. S. 335 (1948), *United States* v. *Johnson,* 333 U. S. 10 (1948), Cf. *Vale* v. *Louisiana,* 300 U. S. 30 (1970).

9. 532 F. 2d 773 at 780, ft. 4.

(*Chimel* v. *California, Vale* v. *Louisiana*), and for which a *per se* warrant rule has been established, the more recent cases, in which this Court has applied a "reasonableness" standard, have one element in common: the arrest—the primary invasion of individual privacy—had already taken place properly and with a probable cause. (*Chambers* v. *Maroney, Cady* v. *Dombrowski, Cardwell* v. *Lewis, United States* v. *Robinson, United States* v. *Edwards, supra.*)

In each case a seizure of the person (or persons), which was held to be lawful, had transpired. The arrest was proper. Mr. Justice White speaking for a majority of the Court in *Chambers* v. *Maroney, supra,* developed the concept of "greater" and "lesser" invasions of privacy based upon the premise of a lawful seizure of the person. He stated:

> But which is the 'greater' and which the 'lesser' intrusion is itself a debatable question and the answer may depend on a variety of circumstances. For Constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment. (399 U. S. 42 at 51.)

Concededly, the language quoted above has reference to the search of an automobile. Motor vehicles, because of their mobility, have always had more flexible standards of search and seizure applied to them. *Carroll* v. *United States,* 267 U. S. 132 (1925). However in *Chambers* v. *Maroney, supra,* the automobile in question had been seized and taken to the police station, as by analogy, the footlocker in this case had been. The point in *Chambers,* as we understand the ruling, was that the vehicle in that case *could have been* searched at the scene of the arrest, which was lawful, and there was probable cause to search it; therefore, the search at the police station was the "lesser intrusion" under the Fourth Amendment and therefore reasonable.

We submit that the instant case is far more analogous to the *Chambers, Cady, Cardwell* line of cases than to *Chimel* v. *California.* The footlocker in this case was placed in the trunk of Chadwick's car for one purpose and one purpose only: to be driven off (the other luggage of Machado and Leavy had been placed in the car).

The majority of the lower courts characterized the trunk of Chadwick's car as ". . . nothing more than a platform or resting place for the footlocker."[10] This, we submit, is unrealistic. Should the agents have waited until Chadwick, Machado and Leavy drove off before stopping them in order to qualify for the *Chambers, Carroll* exception to the warrant requirement, with the attendant risk of losing their car in traffic?[11]

We believe that the automobile exception to the warrant requirement would have permitted a search of the footlocker at the Amtrak station when the arrest was made. Probable cause clearly existed to search the footlocker. *Carroll* v. *United States, supra.* If the search could have been made then, the "lesser intrusion" theory of *Chambers* v. *Maroney, supra,* applies by analogy to the search of the footlocker at the DALE office.

We would, thus, suggest that the recent teachings of this Court, in cases dealing with searches which do not involve dwellings or offices, clearly indicate that (1) where there is probable cause to search for contraband or evidence, (2) where a lawful arrest has been made which involves a person, movable personal possessions or vehicles, and (3) where a search of such effects would be permissible at the scene of the arrest; then the "reasonableness clause" of the Fourth Amendment should control.

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10. 532 F. 2d 773 at 778.

11. Cf. *United States* v. *Bozada,* 473 F. 2d 389 (1973), in which the United States Court of Appeals for the Eighth Circuit (*en banc*) sustained the warrantless search of a trailer full of stolen goods even though the tractor cab had not been hooked up to the trailer. The court based its decision on "reasonableness."

The statement approved by this Court in *United States* v. *Edwards,* 415 U. S. 800, is apposite:

> While the legal arrest of a person should not destroy the privacy of his *premises,* it does— for at least a *reasonable* time and to a *reasonable* extent—take his own privacy out of the realm of police interest in weapons, means of escape and evidence. (At 808, 809, emphasis supplied.)

We urge this Court to rule accordingly in this case.

II. The Fact That Law Enforcement Officers were Acting in Good Faith Should be Given Weight in Determining Whether a Given Search and Seizure was Reasonable.

Amici are aware that the viability of the Exclusionary Rule has not been certified in the instant case and we will not argue the matter. Nevertheless, we believe that the dissent of Mr. Justice White in *Stone* v. *Powell* and *Wolff* v. *Rice,* ..... U. S. ....., 96 S. Ct. 3037 (1976) has a bearing on our contention that *reasonableness* should be the criterion for judging the lawful nature of those classes of searches and seizures which we have discussed in part I of our Argument in this case.

Mr. Justice White, in *Stone and Wolff, supra,* indicated that he would ". . . join four or more other Justices[12] in substantially limiting the reach of the exclusionary rule as presently administered under the Fourth Amendment in federal and state criminal trials."[13] He based this opinion on the proposition that in ". . . many circumstances . . . the evidence was seized by an officer acting in the good-faith belief that his conduct comported with existing law and having reasonable grounds for the belief."[14]

12. Mr. Chief Justice Burger has also indicated a willingness to modify or do away with the Exclusionary Rule. *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U. S. 388 (1971) at 414 (dissenting opinion); *Stone* v. *Powell, Wolff* v. *Rice,* U. S. ....., 96 S. Ct. 3037 (1976) at 3052.

13. ..... U. S. ....., 96 S. Ct. 3037 (1976) at 3072.

14. *Ibid.*

He continued:

> When law enforcement personnel have acted mistakenly, but in good faith and on *reasonable* grounds, and yet the evidence they have seized is later excluded, the exclusion can have no deterrent effect.[15] (Emphasis supplied.)

The key word in this statement is the word "reasonable." The Court of Appeals below found expressly that ". . . there is no evidence that (the agents) acted in bad faith:"[16] We submit that, particularly insofar as the warrantless search of the footlocker is concerned, the agents acted in a good faith belief, which was reasonable, that they were acting properly.

If, as we suggest, a standard of "reasonableness" is to be applied to cases such as the instant case, then the good faith (or lack of bad faith) of the law enforcement officers involved has a specific bearing upon whether the search and seizure was reasonable.

When this Court chooses to consider the continued viability of the Exclusionary Rule, the issue of good faith police action will be one of the, if not *the,* primary questions. Until that time however, we submit that the good faith issue should be seriously considered in any case in which the contention is made that a given search and seizure is "reasonable" and should be sustained under the "reasonableness clause" of the Fourth Amendment.

CONCLUSION.

The confusion that exists in the minds of law enforcement officers and even lower courts is amply demonstrated by the instant case. This confusion appears to stem in large measure from the tension between the "warrant clause" and the "reasonableness clause" of the Fourth Amendment. A definitive ruling by this Court on this matter would go a long way towards resolving this confusion.

15. *Ibid,* at 3073.

16. 532 F. 2d 773 (1976) at 785.

We respectfully suggest a ruling which would declare warrantless searches of vehicles, persons and movable personal property at a place remote from the place of a lawful arrest to be proper under the "reasonableness clause" of the Fourth Amendment. Such a ruling would be a development of the "lesser intrusion" theory enunciated in *Chambers* v. *Maroney, supra.*

We also submit that the fact that law enforcement officers were acting in good faith, while not controlling under present Fourth Amendment law, should be accorded weight in determining whether a given search and seizure, in cases such as the instant case, was reasonable.

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